

# Draft EIS - Chapter 1

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# 1.0 INTRODUCTION

In this Draft Environmental Impact Statement (DEIS), the Bureau of Land Management (BLM) considers the effects of a proposed rulemaking to revise the regulations governing livestock grazing on public lands. The BLM, and all Federal agencies, are required by the National Environmental Policy Act (NEPA) to prepare an EIS if a proposed action has effects that are expected to be significant and that are not fully covered in an existing EIS. Because there appeared to be substantial controversy regarding the degree to which the proposed regulations effect the human environment, the BLM determined that an environmental impact statement was required.

Chapter 1 of this DEIS contains background information on the livestock grazing program, a discussion of the purpose and need for the regulatory revisions, and a brief summary of the scoping process and results.

## 1.1 BACKGROUND

A brief summary of the livestock grazing program, including laws, regulations and program operations, is presented below. This information is provided to assist the reader in understanding the context of the proposed revisions to the regulations.

### 1.1.1 Laws Governing the BLM Grazing Program

The primary laws that govern grazing on public land are The Taylor Grazing Act (TGA) of 1934, The Federal Land Policy and Management Act (FLPMA) of 1976, and The Public Rangelands Improvement Act (PRIA) of 1978.

These laws mandate managing uses of and resources on public land in a way that maintains or improves its condition. The TGA directs that occupation and use of the range be regulated to preserve the land and its resources from destruction or unnecessary injury, and to provide for the orderly use, improvement, and development of the range. The FLPMA provides authority and direction for managing the public lands on the basis of multiple use and sustained yield and mandates land use planning principles and procedures for the public lands. The PRIA defines rangelands as public lands on which there is domestic livestock grazing or which are determined to be suitable for livestock grazing, establishes a national policy to improve the condition of public rangelands so they will become as productive as feasible for all rangeland values, requires a national inventory of public rangeland conditions and trends, and authorizes funding for range improvement projects.

### 1.1.2 Grazing Regulations

The BLM administers its grazing program under 43 CFR 4100 of the Code of Federal Regulations (CFR). The regulations carry out the laws enacted by Congress.

Since the first set of grazing regulations was issued after passage of the Taylor Grazing Act in 1934, they have been periodically amended and updated. The last major revision was called Rangeland Reform. Rangeland Reform was proposed in partnership with the Forest Service in the U.S. Department of Agriculture. The broad purpose of Rangeland Reform was to improve ecological conditions while allowing for sustainable development. Changes made to

the grazing rules in 1995 included the following:

1. Revised the term "grazing preference" to mean a priority position against other applicants for receiving a grazing permit, rather than a specified amount of public land forage apportioned and attached to a base property owned or controlled by a permittee or lessee, and added the term "permitted use" to describe forage use amounts authorized by grazing permits or leases;
2. Removed the requirement that one must be engaged in the livestock business to qualify for grazing use on public lands;
3. Required applicants for a new or renewed grazing permit to have a satisfactory record of performance;
4. Provided that BLM could issue a conservation use permit to authorize permittees not to graze their permitted allotments;
5. Limited authorized temporary nonuse to 3 years;
6. Required grazing fee surcharges for permittees who do not own the cattle that graze under their permits;
7. Provided that the United States hold 100% of the vested title to permanent range improvements, constructed under cooperative agreements, rather than proportionately sharing title with the cooperators;
8. Required livestock operators and the BLM to use cooperative agreements to authorize new permanent water developments, instead of allowing some water developments to be authorized under range improvement permits;
9. Provided that after August 21, 1995, the United States, if allowed by State water laws, would acquire livestock water rights on public lands;
10. Authorized BLM to approve nonmonetary settlement of nonwillful grazing trespass under certain circumstances;
11. Expanded the list of prohibited acts applicable to grazing activities;
12. Established Fundamentals of Rangeland Health; and
13. Created a process for developing and applying state or regional standards for land health and guidelines for livestock grazing as a yardstick for grazing management performance.

In addition, revisions were made to BLM's regulations at 43 CFR Subpart 1784 on Advisory Committees to establish Resource Advisory Councils (RACs) to allow for increased public participation in and advice to BLM resource management programs. The RACs replaced the BLM grazing advisory boards and district advisory councils, and were set up to represent diverse interests and employ consensus decision making.

Policy and procedural guidance on how to implement the regulations is provided in BLM manuals and handbooks.

### **1.1.3 Land Use Plans**

Under FLPMA, public land must be managed pursuant to land use plans using multiple use and sustained yield concepts and a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences. Additionally, the public land must be managed to recognize the nation's need for domestic sources of minerals, food, timber, and fiber. FLPMA requires that land use plans be prepared to achieve these and other statutory objectives.

Land use plans are designed to set goals for land use and future conditions that BLM and others believe are desirable. The Bureau of Land Management's land use plans provide the basis for every action and approved use that takes place on land the agency manages, and are created with the help of interested individuals and groups from the public and government. Each BLM Field Office is required to be covered by a land use plan and grazing is a resource use where appropriate.

On the basis of present planning guidance, livestock grazing decisions found in land use plans include the identification of lands available or not available for livestock grazing; for those lands available for grazing, identification on an areawide basis of both existing permitted use and future anticipated permitted use with full implementation of the land use plan while maintaining a thriving ecological balance and multiple-use relations; and identification of guidelines and criteria for future allotment-specific adjustments in permitted use, season of use, or other grazing management practices. Standards for rangeland health and guidelines for grazing administration are also incorporated into land use plans.

FLPMA requires that the public be involved in the development of land use plans. Public participation and collaboration are encouraged throughout the planning process. NEPA also sets forth as policy that Federal agencies shall to the fullest extent possible encourage and facilitate public involvement in decisions which affect the quality of the human environment. One of the primary functions of NEPA is to disclose to the public the effects on the human environment of proposed actions and alternatives. The BLM uses a process to create or update land use plans that is fully integrated and consistent with the NEPA process and Council on Environmental Quality regulations.

#### **1.1.4 Overview of the Livestock Grazing Program**

All allowable uses on BLM lands, such as grazing, are described in land use plans. These plans now provide for about 160 million acres (see Figure 1.1) in the West as available for livestock grazing. The instrument that authorizes grazing use is called a grazing permit or lease. A BLM grazing permit or lease authorizes a permittee (or lessee) to graze livestock on one or more grazing administrative units called allotments. Permittees or lessees can be individual citizens or business entities such as corporations, associations, and partnerships. Allotments range in size from small (1,000 acres or fewer) to vast (more than a million acres).

The Taylor Grazing Act of 1934 (TGA) mandates the government to determine, for the western public lands, how much forage is available for livestock grazing, who should get the grazing permits, and how grazing is to occur. The TGA provides that preference for a permit shall be given in the issuance of grazing permits to nearby landowners engaged in the livestock business, settlers, those who owned water or water rights, and other stockowners as necessary to permit the proper use of the privately owned land or water. The TGA also provides that recognized and acknowledged grazing privileges shall be adequately safeguarded, so far as consistent with the purposes of the TGA. Once this system was established, Congress intended that the grazing privilege was to be safeguarded as long as it comported with sound land management practices. Where FLPMA land use planning has determined that grazing continues to be an appropriate use of the land, permittees who comply with their permits and other applicable rules and regulations receive first priority for renewal of their expiring permits.

The government developed a system for keeping records regarding who has priority for grazing privileges on public land. Those who made application and were approved during the establishment of grazing privileges during the priority years following passage of the TGA

offered land or water as base property to which grazing preference was attached. Once approved, whoever owns or controls base property has priority or "preference" and is granted the permitted grazing use. This system also allows for preference to be transferred from one property to another, or from one person to another.

The amount of forage that a permittee may graze on an allotment each year is called "active use" and the lessee or permittee is obligated to graze livestock at this level unless resource conditions or other considerations warrant taking nonuse. When the owner or lessee of a base property applies for grazing use, he or she is issued a permit or lease that specifies which allotment(s) are to be used, the number of livestock to be allowed, when they can graze, and other management terms and conditions. In some instances, there is an "Allotment Management Plan" (AMP) that describes in detail how grazing is to occur on a specific allotment, and these plans become part of the grazing permit or lease.

Sometimes operators do not wish to graze all of the active use allowed by their permits or leases. When this happens, BLM can approve nonuse to help conserve resources or for other reasons specified by the permittee or lessee, including financial reasons. In some instances, BLM may temporarily authorize another operator to make grazing use through a nonrenewable permit if the nonuse is not for resource conservation reasons. In a good growth year, forage is temporarily available on the range that exceeds the amount of use permitted. When this happens, BLM may temporarily authorize grazing use that exceeds the established level of permitted use.

The BLM may allow operators to graze livestock owned by another entity on their permitted allotments. When this happens, they must submit a livestock control agreement to BLM and pay an extra fee called a surcharge.

The BLM may cancel a permit or lease and the preference for the permitted use that was attached to the base property for grazing rules violations. This happens in few instances, but when it does, BLM may award the forage to a new applicant.

Permits or leases may be modified as a result of, among other things, implementation of the rangeland health standards and guidelines process in which data (i.e., vegetation, watershed, wildlife, and others) are collected and analyzed by a BLM interdisciplinary team. The team also considers any other resource and land use plan issues and provides an evaluation report to the BLM authorized officer. The authorized officer then determines if an allotment has met the standards for rangeland health, and if not, identifies the significant causal factors for not meeting the standards.

Upon determining that existing grazing management practices or levels of grazing use are significant factors in failure to achieve the rangeland health standards and conform to the guidelines, the BLM has until the next grazing season to implement actions that will result in significant progress toward meeting them. Actions to be implemented must be analyzed through the NEPA process, which normally requires an environmental assessment. After undergoing the NEPA process, the actions are incorporated into the new grazing permit or lease and then the permit or lease is issued. Whether an allotment does or does not meet a standard for rangeland health, the effects of issuing a permit or lease are appropriately analyzed under the NEPA.

Another tool for maintaining or improving land conditions is to install rangeland improvement projects, such as water pipelines, reservoirs, or fences.

In 2002, grazing operators held 18,142 BLM grazing permits and leases. These permits and leases allowed for as many as 12.7 million Animal Unit Months (AUMs) of grazing use, with 7.9 million AUMs authorized as active use and 4.8 million AUMs authorized as temporary nonuse or conservation use. In 2003, AUM usage declined to 6.9 million. This decline was the result of decreased forage growth due to extended drought, fire, and other factors. This

decrease in forage resulted in ranchers reducing their herds and using less AUMs than allowed under grazing permits and leases.

## **1.2 THE PURPOSE OF AND NEED FOR THE PROPOSED ACTION**

The overall purpose and need for revising the regulations, as well as the purpose and need for revising specific elements of the regulations, are described in this section.

### **1.2.1 General Purpose and Need**

Revisions to the grazing regulations are needed to advance our goal of using cooperation as a means of achieving BLM's rangeland management objectives. The regulatory revisions are intended to improve working relations with permittees and lessees, to protect the health of the rangelands, and to increase administrative efficiency and effectiveness, including resolution of legal issues.

The BLM is committed to making changes to reflect the Secretary of the Interior's "4 C's" philosophy of "consultation, cooperation, and communication all in the service of conservation" and to provide for economically viable ranching operations and rangeland health.

The regulatory changes are narrow in scope, make no changes in grazing fees or the substance of the fundamentals of rangeland health or the standards and guidelines for grazing administration, and otherwise leave the majority of the 1995 regulatory changes in place. The changes that are proposed are driven by specific issues and concerns that have come to BLM's attention through experience with the current regulations and from public comments provided to the BLM.

### **1.2.2 Purpose and Need by Topic**

The following major issues drive the proposed rulemaking and this EIS and the present problem or need that BLM intends to address. As stated before, these issues came to the fore as areas where the BLM could improve working relations with permittees and lessees, protect the health of the rangelands, and increase administrative efficiency and effectiveness, including resolution of legal issues.

The major areas of focus under these issues are:

#### **Improving Working Relations with Permittees and Lessees**

- Social, Economic, and Cultural Considerations in the Decision-Making Process
- Implementation of Changes in Grazing Use
- Range Improvement Ownership
- Cooperation with State, Local, and County Established Grazing Boards
- Review of Biological Assessments and Biological Evaluations

#### **Protecting the Health of the Rangelands**

- Temporary Nonuse
- Basis for Rangeland Health Determinations

- Timeframe for Taking Action to Meet Rangeland Health Standards

#### Increasing Administrative Efficiency and Effectiveness, Including Resolution of Legal Issues

- Conservation Use
- Definition of Grazing Preference, Permitted Use, and Active Use
- Definition and Role of Interested Public
- Water Rights
- Satisfactory Performance of Permittee or Lessee
- Changes in Grazing Use Within the Terms and Conditions of Permit or Lease
- Service Charges
- Prohibited Acts
- Grazing Use Pending Resolution of Appeals when Decision has been Stayed
- Treatment of Biological Assessments and Biological Evaluations in the Grazing Decision-Making Process

#### **1.2.2.1 Social, Economic, and Cultural Considerations**

NEPA and its implementing regulations require that all Federal agencies use qualified specialists from the various physical and social science disciplines to perform analyses, such as environmental assessments, under this law. In addition to assessing effects on various environmental elements such as vegetation, wildlife, and water quality, the law and NEPA regulations require the BLM to assess effects on economic, social, and cultural environments. No specific reference to these elements exists in the present BLM grazing regulations. The degree and nature of documentation of social, economic and cultural factors in NEPA documents varies across the BLM. The question remains whether BLM should change its grazing regulations to include language concerning the analysis of economic, social, and cultural effects, thereby enhancing consistency and clarity. Many grazing operators believe that these factors are not adequately considered by BLM and that they should always be part of the written analysis in NEPA documents. This issue is addressed in this DEIS.

#### **1.2.2.2 Implementation of Changes in Grazing Use**

When BLM implements substantial changes in a permittee's active use, this is sometimes done within a timeframe that causes sudden adverse economic effects, affects the ability to make operational adjustments such as pasture rotations, or does not allow enough time for herd size changes. In these instances, the opportunity to monitor and adjust based on increments of change is also foregone. Before the 1995 Rangeland Reform changes, there was a 5-year phase-in period in the regulations for the implementation of such changes. To address concerns about this issue, consideration is given in the Proposed Rule and DEIS to the implementation of changes in active use within a timeframe that allows such changes to be absorbed without an unreasonably negative effect on a permittee.

#### **1.2.2.3 Range Improvement Ownership**

The regulations that went into effect in 1995 provided that title to new permanent range improvements developed under a cooperative range improvement agreement would be held by the United States government, even if a grazing user funded or built them. This change was meant to conform with the common law concept that title to permanent improvements should go to the landowner, which in this case is the Federal government. This change was also implemented to conform to the practice of the Forest Service and to BLM's own practice before rule changes took place in the early 1980s. However, many grazing operators have said that having range improvements jointly owned by the Federal government and the operator contributes to healthy range conditions and allows them to more easily obtain loans for their operations. They have also said that joint ownership would offer an incentive for operators to construct improvements, and that the present situation leaves them with little incentive to invest in improvements if they can't claim the value of their contribution as part of their ranching operation. Grazing users believe that, under present regulations, the fact that range improvements are entirely owned by the Federal government does not adequately reflect their role in purchasing and/or installing those improvements. Consideration of shared ownership of range improvements is, therefore, an issue addressed in this Proposed Rule and DEIS.

#### **1.2.2.4 Cooperation with State, Local, and County Established Grazing Boards**

The present grazing regulations provide that the BLM will cooperate with other agencies and units of government that have responsibilities for grazing on public lands, and specifically state that the BLM will "cooperate with State, County, and Federal agencies in the administration of laws and regulations relating to livestock, livestock diseases, sanitation, and noxious weeds including (a) State cattle and sheep sanitary or brand boards...and (b) County or other local weed control districts...."

Many western States have State, county, or locally established grazing advisory boards that provide guidance on range improvements on public lands. Section 401 (b)(1) of FLPMA states that a portion of the grazing fees collected are set aside for range betterment. After BLM consults with the local user representatives, half the fee amount is to be used in the area where the fees were collected for range rehabilitation, protection, and improvements. There is no specific provision, however, in the present regulations that requires BLM to cooperate with State, county, or locally established grazing advisory boards.

Grazing interests and State and local governments have raised concerns that the grazing advisory boards have not been used effectively by the BLM and are underutilized as a tool for gathering local input for BLM decisions on range improvements and allotment management planning. For these reasons, the BLM is addressing the issue of cooperation with such grazing boards, where they exist, in this Proposed Rule and DEIS.

#### **1.2.2.5 Review of Biological Assessments and Evaluations**

Under the current regulations, the BLM must provide the permittee, the pertinent State, and the interested public an opportunity to review reports that are used to support decisions for making changes in grazing use. However, the present regulations do not specifically address the review of biological assessments or biological evaluations, which are prepared to comply with the consultation requirements of the Endangered Species Act.

A biological evaluation (BE) provides a detailed review of programs or activities to determine how an action or proposed action may affect any threatened, endangered, proposed or sensitive species or proposed designated critical habitat. Where listed species are not likely to be adversely affected and formal consultation is not anticipated, the BE provides the basis of evaluation during informal consultation. A biological assessment (BA) is prepared to determine whether a proposed action is likely to: (1) adversely affect listed species or

designated critical habitat, (2) jeopardize the continued existence of species that are proposed for listing; or (3) adversely modify critical habitat. BAs must also be prepared for "major construction activities" per 50 CFR §402.2. The BA's conclusion determines whether a formal consultation or conference is necessary. The FWS and/or NOAA Fisheries must concur with the BA before formal consultation can begin.

When biological assessments or biological evaluations are included within the body of information that is used to support modification of grazing permits, the BLM is required to make these assessments available for comment and review by the affected permittees and lessees, the interested public, and State agency staff. However, BLM has not been consistent in making these assessments or evaluations available. Therefore, a solution is needed to ensure more consistent application of opportunities for public review of biological assessments and biological evaluations based on the nature and purpose of the document. Clarification of this requirement is, therefore, addressed in the Proposed Rule and DEIS.

#### **1.2.2.6 Temporary Nonuse**

Before the 1995 regulatory changes a permittee could apply to not use all or a portion of their active grazing use for purposes of conservation and protection of the public lands, due to annual fluctuations of livestock operations, for financial or other reasons beyond control of the operator, or due to livestock disease or quarantine. There was no restriction on the number of consecutive years a permittee or lessee could apply for nonuse. Such nonuse could be approved each year during the permit if need be.

The 1995 regulations re-characterized BLM's pre-1995 authority to approve nonuse for reasons of conservation and protection of the public lands as approving "Conservation Use." The 1995 regulations provide that a permittee or lessee may apply to not use all or a part of the use authorized by their permit for purposes including but *not limited to* personal or business reasons (i.e. nonuse for conservation and protection is also allowed by the current regulations), but BLM may only approve such nonuse for three consecutive years. The current regulations provide that if a permittee or lessee wishes to take nonuse for longer than three consecutive years for purposes of resource conservation or protection, then BLM could issue them a "Conservation Use" grazing permit. However, a 1999 ruling by the 10th Circuit Court determined that BLM did not have the authority to issue "Conservation Use" permits. As a result, even if the operator wishes to apply for nonuse for conservation and protection of the public lands for longer than three consecutive years, and BLM believes that the resource would benefit and would like to approve the nonuse, BLM is prevented by its current rules from approving it. BLM always has the ability to suspend grazing use to protect resources. However, when both parties agree that nonuse would benefit the resources, it is more efficient and conducive to a climate of cooperation for BLM to approve an operator application for nonuse than to suspend grazing use using BLM's grazing decision process.

Therefore, to promote greater flexibility and enhanced opportunity for cooperation and coordination with the permittee and lessee, the BLM needs to consider changes in the regulations to provide a mechanism to allow longer periods of nonuse as needed to ensure the health of the rangelands. Consideration of allowing BLM to approve applications for nonuse each year is, therefore, addressed in the Proposed Rule and DEIS.

#### **1.2.2.7 Basis for Rangeland Health Determinations**

The present regulations do not identify what data or information is to be used by the BLM to determine that existing grazing management practices or levels of grazing use on public land are significant factors in failing to achieve the rangeland health standards and conform with the guidelines for grazing administration.

The BLM has issued detailed policy and procedural guidance to the field in Manual Section 4180 and Handbook H-4180-1, Rangeland Health Standards, on how to evaluate rangeland health standards, make determinations, and develop and implement plans to address appropriate actions for achieving or progressing toward achievement of standards or fundamentals of rangeland health conditions. The guidance addresses how to conduct an evaluation and assessment and identifies monitoring data as an important source of information in conducting the evaluation. Where data is not available or not adequate for making the determination, it is recommended that the manager initiate action necessary to gather the information needed to complete the evaluation.

Members of the public, in scoping and ongoing communications with the BLM, have expressed a strong interest in BLM's monitoring program and, particularly, in ensuring that adequate and sufficient monitoring data are available to support our decisions and determinations. Concerns have been raised about the validity and credibility of basing a determination on a one-time assessment. Multiyear monitoring data are considered by some members of the public as a minimum requirement for making determinations. Consideration of requirements for both assessments and monitoring data as a basis for rangeland health determinations is, therefore, addressed in this Proposed Rule and DEIS.

### **1.2.2.8 Timeframe for Taking Action to Meet Rangeland Health Standards**

The 1995 regulations established the fundamentals of rangeland health and called for BLM to establish, within geographic regions and in consultation with Resource Advisory Councils, standards and guidelines for grazing administration. Fallback standards and guidelines were also identified to be used in the event that regional standards and guidelines were not established by a specified date. Most BLM States have completed development of regional standards and guidelines.

Under the regulations BLM is required to take appropriate action, as soon as practicable but not later than the start of the next grazing year, upon determining that existing grazing management needs to be modified to ensure that the fundamentals are being met or that existing grazing management practices or levels of use on public lands are significant factors in failing to achieve the standards and conform with the guidelines.

This timeframe has proven to be too short in many instances, especially given that NEPA and other environmental laws such as the Endangered Species Act Section 7 consultation where applicable and the Archeological Resources Protection Act Section 106 clearance, must be satisfied before a decision is made on the "appropriate action." In addition, the BLM must satisfy consultation, cooperation, and coordination requirements before identifying the proposed action. The mandate that the proposed appropriate action be developed and implemented before the start of the next grazing year has often created unreasonable timeframes. For this reason, therefore, consideration is given in the Proposed Rule and DEIS to providing a reasonable timeframe to develop an appropriate action or plan after a determination has been made.

### **1.2.2.9 Conservation Use**

The 1995 regulations authorized the BLM to issue "Conservation Use" permits to groups or individuals for an activity, excluding livestock grazing, for the purposes of protecting the land from destruction or unnecessary injury, improving rangeland conditions, or enhancing resource values, uses, or functions. The authority for BLM to issue conservation use permits was challenged in court, with the result that in 1999 the Tenth Circuit Court of Appeals held that the Taylor Grazing Act stipulated that the primary purpose of issuing a grazing permit is to permit grazing and that BLM could not issue permits exclusively for conservation purposes (Public Lands Council v. Babbitt, 167 F.3d 1287, 1308 (10th Cir. 1999), aff'd on other

grounds, 529 U.S. 728 (2000)). This decision was not appealed to the Supreme Court and thus is the final judicial determination on this issue. The present regulations do not conform with the court's finding. The removal from the BLM grazing regulations of all references to conservation use and conservation use permits is, therefore, addressed in this Proposed Rule and DEIS.

#### **1.2.2.10 Definition of Preference, Permitted Use, and Active Use**

"Grazing preference" has been defined since 1995 as a priority position against others for the purpose of receiving a grazing permit or lease. This priority is attached to base property owned or controlled by the permittee or lessee. Before 1995, grazing preference was defined as the total number of animal unit months (AUMs) of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee.

"Permitted use" was introduced as a term in the 1995 regulations revisions to define an amount of forage allocated by a land use plan for livestock grazing in an allotment. It is expressed in AUMs and includes "active use" and "suspended use." Thus, in 1995, the term "permitted use" replaced the term "grazing preference" in describing the quantity of forage allocated.

Since 1995, "active use" has meant "current authorized use including livestock grazing and conservation use." The BLM must remove conservation use from the definition because of the 1999 10th Circuit Court decision in *Public Lands Council v. Babbitt*. The 1995 definition used the term livestock grazing to distinguish between "active" authorized grazing use and "active" authorized conservation use. Removing conservation use from this definition eliminates the need for this distinction.

The 1995 regulation revisions, which changed "grazing preference" from a term having a quantitative meaning (number of AUMs) to a qualitative meaning (superior position) and which introduced the new term, "permitted use," to represent the number of AUMs, have proven to be confusing. Attaching or associating a public land forage allocation to or with base property provides a reliable and predictable way to connect ranch property transactions with the priority for use of the public land grazing privileges that BLM has associated with that property. This has been the foundation of BLM's system for tracking who has priority for receipt of public land grazing privileges since the enactment of the TGA. To clarify these terms and improve consistency in their application, consideration is being given to a modification of the definitions of grazing preference and active use and deletion of the term permitted use in this Proposed Rule and DEIS.

#### **1.2.2.11 Definition and Role of the Interested Public**

The present regulations define "interested public" as an individual, group, or organization that has (a) submitted a written request to the BLM to be provided an opportunity to be involved in the decision-making process for the management of livestock grazing on a specific allotment, or (b) has submitted comments to BLM regarding the management of livestock grazing on a specific allotment. On the basis of this definition, an individual or organization may be identified as an interested public covering an array of actions without participating in the public process leading to a specific grazing decision. Under the current regulations, someone could remain on the list of interested public indefinitely without ever commenting on or otherwise providing input in the decision-making process.

Under the present rules, the BLM is required to consult, coordinate, and cooperate with the

interested public before a proposed decision on the following actions:

- Designation or adjustment of allotment boundaries,
- Apportionment of additional forage,
- Reductions in permitted use,
- Emergency closures or modifications,
- Development or modification of grazing activity plans,
- Plans for range development or improvement programs,
- Renewal or issuance of grazing permits or leases,
- Modification of a permit or lease, or
- Issuance of temporary nonrenewable grazing permits.

The interested public is also provided a copy of all proposed and final decisions.

In addition, the interested public must be provided an opportunity to review, comment, and give input during the preparation of grazing evaluation reports used to support decisions. In some instances, this has led to confusion and suggestions that reports prepared to support decision processes are decisions themselves, with comment periods.

These requirements for involving the interested public in the development of decisions and plans on almost every level and aspect of the grazing program are very extensive, and are considered by some to be excessive, inefficient, or nonproductive. For these reasons, modifying the definition of "interested public," reducing the level of involvement of the interested public in the day-to-day grazing operation decisions, and refocusing participation on the primary decisions that set management direction are considered in this Proposed Rule and DEIS.

#### **1.2.2.12 Water Rights**

In 1995, the BLM added a provision to the regulations that stated that livestock water rights would be sought solely in the name of the United States under State water law. This was added because BLM wanted to (1) clarify its policy, and (2) make its policy consistent with that of the U.S. Forest Service. The BLM explained in the 1995 rulemaking that seeking water rights under State law had been its policy since 1981, and it would not be creating any new Federal reserved water rights or affecting valid existing rights.

Except for Federal reserved water rights for Public Water Reserves, livestock water rights are not Federal rights. They are State-based rights that require the United States, like any other entity, to comply with State substantive and procedural requirements to obtain them.

The current regulations limit BLM's flexibility to cooperatively pursue livestock water rights with permittees or lessees. To enhance such flexibility, BLM is considering modifications to the water rights provisions in this Proposed Rule and EIS.

#### **1.2.2.13 Satisfactory Performance of Permittee or Lessee**

By regulation, the BLM must determine whether applicants who apply for a new grazing permit or lease have a satisfactory record of past performance. The regulations define under what circumstances operators would be deemed to have an unsatisfactory performance,

including:

- having had a Federal grazing permit or lease cancelled for violations within 36 months of their application;
- having had a State permit or lease, for lands within the grazing allotment for which they are applying, cancelled for violations within 36 months of their application; or
- having been barred from holding a Federal grazing permit or lease by order of a court of competent jurisdiction.

Determinations of unsatisfactory performance in cases such as these are complicated by the wording of the present regulations. Although it is clear that if any one of these conditions exist the applicant would be deemed to not have a record of satisfactory performance, it is ambiguous as to what constitutes satisfactory performance. Some have interpreted the existing regulatory language to mean that there may be other conditions that would result in a determination that the applicant's performance is unsatisfactory. This open-ended definition has created some confusion. For these reasons, the BLM is considering revisions to the regulations to clarify the definition of satisfactory performance for applicants for a permit or lease in this Proposed Rule and DEIS.

#### **1.2.2.14 Changes in Grazing Use Within the Terms and Conditions of Permit or Lease**

The present regulations state that changes in grazing use within the terms and conditions of the permit or lease may be granted by the BLM. There is no regulatory language, however, that defines what is meant by "within the terms and conditions of the permit or lease." This could lead to inconsistent interpretations and applications of this provision. Clarification and definition of what is meant by "within the terms and conditions" is, therefore, a consideration in this Proposed Rule and DEIS.

#### **1.2.2.15 Service Charges**

Regulations allow BLM to assess a service fee for processing each crossing permit, transfer of grazing preference, and cancellation and replacement of a grazing fee billing. Under FLPMA, these service charges should reflect BLM's processing costs and should be adjusted periodically as costs change. A \$10 service fee is presently assessed for each of the above actions. This fee does not reflect BLM's costs to provide these services. Consideration of revisions to the processing service charges to more adequately cover costs are, therefore, addressed in this Proposed Rule and DEIS.

#### **1.2.2.16 Prohibited Acts**

Regulatory changes from 1978 through the 1995 established several prohibited acts that are part of the present regulations. There are three categories of prohibited acts. The third category of prohibited acts identifies generally and specifically a number of Federal and State laws under which, if the permittee or lessee performs such acts, he may be subject to civil penalties (i.e., withdrawal of issuance, suspension, or cancellation of his permit or lease) if public land is involved or affected; the violation is related to grazing use authorized by a BLM permit or lease; the permittee or lessee has been convicted or otherwise found to be in violation of the laws or regulations; and no further appeals are outstanding.

As presently written, it is somewhat unclear as to whether or not the performance of the prohibited act must occur on the allotment for which the permittee or lessee has a BLM permit or lease. In other words, the current regulation does not limit citation under these

prohibited acts to a grazing operator's allotment, i.e., the operator can be cited for violating an act outside the allotment and be subject to the civil penalties.

Furthermore, there is some concern that some of the laws and regulations identified in this category of prohibited acts could result in penalties against permittees and lessees that are unfair because they involve a secondary penalty for a violation of a law or regulation. Some opponents of the current rule characterized the prohibited acts provision as a form of "double jeopardy." Although this is not a frequently applied section of the regulation, the level of controversy over the issue necessitates consideration in this DEIS.

#### **1.2.2.17 Grazing Use Pending Resolution of Appeals When Decision Has Been Stayed**

In general, under current regulations, all final BLM grazing decisions are implemented after the appeal period expires unless the decision is appealed and the Office of Hearings and Appeals or the Interior Board of Land Appeals stays the decision in response to a petition for a stay. The present regulations allow a petition for a stay to be filed by a permittee, lessee, or interested member of the public.

The present rules address grazing use pending resolution of appeals when a decision has been stayed as follows: If a decision on an application for a permit or lease is stayed, an applicant who was granted grazing use in the preceding year may continue at that level of authorized grazing use during the time the decision is stayed, except where grazing use in the preceding year was authorized on a temporary basis. If the applicant had no authorized grazing use the previous year or the application is for ephemeral or annual grazing use, then grazing use will be consistent with the final decision pending resolution of the appeal. If a decision to change authorized use is appealed and a stay is granted, the grazing use authorized during the time the decision is stayed will not exceed the permittee's or lessee's authorized use in the last year during which any use was authorized. An application for a permit or lease made in conjunction with a preference transfer is not specifically addressed in the present rules. According to the present regulations, if a stay is granted on an appeal of an application by a preference transferee, then grazing use would be authorized consistent with the final decision pending resolution of the appeal. This issue is addressed in the Proposed Rule and DEIS.

Of additional concern is the issue of when an appellant is considered to have exhausted his administrative remedies and can proceed to court. The judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701-706, (APA) provide a right of action against agencies and officers of the United States to persons adversely affected or aggrieved by an agency action. However, such action may be sought in a Federal court only when a decision is "final." Generally, a decision becomes "final" only after appellants exhaust administrative remedies. The Preamble to the Proposed Rule states that BLM is attempting through this Proposed Rule to find a balance between the exhaustion of administrative remedies under the APA and its responsibilities under FLPMA and the TGA. 68 Fed. Reg. at 68465.

#### **1.2.2.18 Treatment of Biological Assessments and Evaluations in the Grazing Decision-Making Process**

The present regulations do not specifically address biological assessments or biological evaluations prepared in compliance with Section 7 consultation requirements of the Endangered Species Act or their treatment in the decision-making process.

A biological evaluation (BE) provides a detailed review of programs or activities to determine how an action or proposed action may affect any threatened, endangered, proposed or sensitive species or proposed designated critical habitat. Where listed species are not likely

to be adversely affected and formal consultation is not anticipated, the BE provides the basis of evaluation during informal consultation. A biological assessment (BA) is prepared to determine whether a proposed action is likely to: (1) adversely affect listed species or designated critical habitat, (2) jeopardize the continued existence of species that are proposed for listing; or (3) adversely modify critical habitat. BAs must also be prepared for "major construction activities" per 50 CFR §402.2. The BA's conclusion determines whether a formal consultation or conference is necessary. The FWS and/or NOAA Fisheries must concur with the BA before formal consultation can begin.

However, in the 2002 Blake decision (Blake et. al. v. Bureau of Land Management, 156 IBLA 280 (2002)), the Interior Board of Land Appeals (IBLA) ruled that biological assessments should be treated as proposed decisions subject to protest and appeal. Treating biological assessments and biological evaluations as decisions would add additional administrative review and process steps beyond those required for a proposed action and could cause considerable delay in reaching a final decision on a proposed action. Due to concerns about such consequences, the BLM is addressing this issue in this Proposed Rule and DEIS.

### 1.3 SCOPING

A brief summary of the scoping process and the results of scoping are presented in this section.

#### 1.3.1 Summary of Scoping Process

The BLM published an Advance Notice of Proposed Rulemaking (ANPR) and Notice of Intent (NOI) to Prepare an EIS in the Federal Register on March 3, 2003. These notices requested public comment to assist BLM in the scoping process for both these documents. Copies of these two publications can be found in Appendix D and Appendix E, respectively, of this EIS. The comment period for both ended on May 2, 2003.

BLM held four public meetings in March 2003 in Albuquerque, New Mexico; Reno, Nevada; Billings, Montana; and Washington, D.C., to take comments and suggestions for the proposed rule and the draft EIS.

	Approximate Attendance	Number of Speakers from the Public
Reno, Nevada	200	25
Billings, Montana	60	23
Albuquerque, New Mexico	50	27
Washington, D.C.	25	5

See Chapter 5 for a more complete discussion of the scoping process and a summary of the scoping comments.

#### 1.3.2 Results of Scoping

BLM received more than 8,300 comments on the ANPR and the NOI. Comments were made orally at the 4 public meetings and submitted via letter, e-mail and facsimile. Most of the written comments were form letters, however, about 35 letters containing substantive comments were received from special interest organizations and State and Federal agencies.

The public comments were extremely useful in the development of the Proposed Rule. The following summarizes some of the major results of scoping with respect to what was included or not included in the Proposed Rule:

- It was stated in the ANPR that consideration was being given to a proposal whereby BLM would be able to authorize the locking of gates on public land to protect private land and improve livestock operations. There was almost universal opposition from all groups to this proposal and it was dropped from further consideration in this rulemaking.
- It was stated in the ANPR that BLM was considering establishing provisions addressing reserve common allotments to be managed as reserve forage areas for use by permittees whose allotments were undergoing restoration treatments and required rest from grazing. Public comments were mixed on this issue, but there were sufficient concerns raised in the public comments that we decided to drop reserve common allotments from further consideration in this rulemaking.
- It was stated in the ANPR that BLM was considering clarifying which nonpermit-related violations we might take into account in penalizing a permittee or lessee. This was a very controversial issue. Although we considered removing several of the identified Federal and State laws and regulations from the list of prohibited acts, we determined that we did not have sufficient justification for making this change in the proposed rule. However it is included in an alternative.
- Although the only reference to monitoring in the ANPR was with respect to the definition, numerous comments were received from the public regarding the need for monitoring and for basing decisions on monitoring. In particular, there was public support for requiring that monitoring data be used in evaluating and determining if existing grazing management practices or levels of grazing use are significant factors in failing to achieve the standards and conform with the guidelines for grazing administration. For this reason, the proposed action incorporates a requirement for using standards assessment and monitoring in arriving at the determination called for in §4180.2(c). In addition, an alternative is provided which allows discretion by the BLM manager in using assessment and monitoring data in making such determinations.
- It was stated in the ANPR that BLM was considering changes to the definition of grazing preference. Ranchers and livestock industry representatives were strongly in favor of returning to the pre-'95 regulatory definition of "preference" which defined the term as the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned or controlled by the permittee or lessee. The BLM has adopted this recommendation in the proposed regulation, but has maintained the concept from the current regulatory definition that "preference" also means a "superior or priority position against others for the purpose of receiving a grazing permit or lease" (§4100.0-5).

The public provided many thoughtful comments on the other issues raised in the ANPR as well as issues not addressed in the ANPR. There were many differing opinions about the pros and cons of various regulatory provisions and these comments were seriously considered in the development of these proposed regulations. A further summary of the public scoping comments are found in Chapter 5 and Appendix C of this DEIS.

## **1.4 RULEMAKING AND EIS PROCESS AND SCHEDULE**

The general process for a rulemaking is as follows: Federal rulemakings are governed by the Administrative Procedure Act which, among other things, gives the public, with some exceptions, the right to participate in the rulemaking process by commenting on proposed rules. Agencies may publish an Advance Notice of Proposed Rulemaking (ANPR) as a means of obtaining public comment on issues the agency is considering addressing in a proposed rule. After consideration of any public comments, the agency publishes the proposed rulemaking in the *Federal Register* for a set period of time for the receipt of comments from the public. All comments are considered and changes may be made to the final rulemaking on the basis of comments received. The final rulemaking is also published in the *Federal Register* with the effective date 30 days, or in the case of a significant rule, 60 days from the publication date. The rulemaking then becomes part of the Code of Federal Regulations.

The preparation of an environmental impact statement (EIS) is governed by the National Environmental Policy Act of 1969 and the Council on Environmental Quality implementing regulations at 40 CFR Parts 1500-1508. When a proposed action, including a proposed regulatory or legislative recommendation, is projected to have a significant effect on the quality of the human environment an EIS must be prepared. An EIS is intended to provide decision makers and the public with a complete and objective evaluation of significant environmental effects, both beneficial and adverse, resulting from a proposed action and all reasonable alternatives. An EIS is the major vehicle for fulfilling the substantive environmental goals set forth in NEPA. The EIS process begins with the publication of a Notice of Intent (NOI) to prepare an EIS and request for public input. Public scoping meetings are also generally announced in the NOI. This early public process is known as scoping and must be open for a minimum of 30 days. The purpose of scoping, among other things, is to involve the public and affected agencies early in the process and to help identify significant issues to be analyzed, as well as alternatives and potential effects to be addressed. After scoping, the agency prepares a Draft EIS. The Draft EIS identifies the purpose and need for the proposed action, identifies alternatives, including the proposed action, the no action alternative, and other alternatives that meet the purpose and need; describes the affected environment; identifies the effects of the alternatives on the human environment; and summarizes consultation and coordination accomplished in the preparation of the Draft EIS. The Draft EIS is then released for public review, at least for 45 days but more typically for 60 days. After public review and consideration of all comments, the agency issues a Final EIS in which responses are provided to all comments on the Draft and any changes in the EIS are incorporated in the Final EIS, including any changes in the proposed action. The Final EIS is released for 30 days, after which the agency issues a Record of Decision (ROD) which sets forth the agency's final decision on the action.

Figure 1.4 graphically displays the EIS and rulemaking process.

## **1.5 RELATION TO OTHER POLICIES, PROGRAMS, AND PLANS**

The BLM has initiated or been a partner in the development of a number of policy and program efforts related to the management of grazing on public lands. These efforts are summarized below:

### **Sustaining Working Landscapes Policy Initiative**

On March 25, 2003, the BLM announced the initiation of a public process to gather input on actions the BLM could take to achieve the goals of the Sustaining Working Landscapes initiative. The idea was to begin identifying means for improving the long-term health and productivity of the public lands through innovative partnerships with permittees and lessees within the present regulatory framework.

Twenty-three public workshops were held in the West and one was held in Washington, D.C. At those workshops we introduced several concepts for consideration, including Conservation Partnerships, Reserve Common Allotments, Voluntary Allotment Restructuring, Conservation Easements, and Endangered Species Mitigation. The public raised many valuable comments and legitimate concerns. As a result of the workshops, as well as a national meeting of BLM Resource Advisory Council (RAC) representatives held in Washington, D.C., in April, it was decided that we would benefit from more involvement and advice from our established advisory councils throughout the West before moving forward with this initiative.

It was decided not to try to develop policy guidance--even in draft form--at this time. Rather, BLM has reviewed the comments from the workshops and attempted to provide responses to many of the questions raised on some of the policy concepts we had identified and provide this information to the Resource Advisory Councils (RACs).

The major components being considered in the Sustaining Working Landscapes Initiative that will be considered by the RACs are summarized below:

(1) Forming Conservation Partnerships with Grazing Permittees and Lessees--Authorized under FLPMA, Conservation Partnerships allow permittees and lessees to voluntarily enter into contracts or agreements with BLM to achieve upland recovery, riparian-wetland restoration, enhanced or improved water quality and quantity, improved wildlife or fisheries habitat, and listed species recovery. In return, conservation partnerships would allow permittees and lessees to seek grants to pay for labor and materials invested in conservation practices or provide increased management flexibility within agreed-on parameters.

(2) Voluntary Allotment Restructuring by Permittees to Improve Range Conditions--Voluntary allotment restructuring involves merging two or more allotments in which one or more of the permittees or lessees agrees to temporarily not graze their livestock. The other permittees or lessees would then be allowed to graze their herds over the entire area, resulting in lighter grazing use. The goal is to improve range conditions while supporting permittee economic viability.

(3) Establishment of Nonregulatory Policy for Reserve Common Allotments--Reserve Common Allotments (RCAs) would be managed as reserve forage areas to restore and recover rangeland. The BLM would allow RCAs to be used by permittees and lessees who are engaged in rangeland restoration and recovery activities that require them to rest their customary allotments. By temporarily shifting their livestock to RCAs, permittees and lessees would be able to rest their allotments while still meeting their economic needs.

(4) Encouraging Creative Ways to Achieve Endangered Species Act Objectives--The preceding elements all provide options for mitigating effects on listed species resulting from livestock grazing. For example, Conservation Partnerships could be used to restore rangelands, which benefit listed species. RCAs are intended to be grazed intermittently, but not to a degree inconsistent with their long-term conservation objective. Restructured allotments could incorporate forage reserves for grazing. Conservation easements could serve as mitigation for some listed species. Mitigation banks could also be an option under these concepts. They would permanently preserve or create listed species habitat, and then use that habitat as a source of mitigation credits to be sold to other land users to mitigate land development effects on listed species in order to comply with the Endangered Species Act.

The twenty-three (23) affected RACs in the West met throughout summer and fall 2003. Comments and recommendations were submitted to the BLM State Directors and forwarded to the Director in November 2003. These comments and recommendations will be the basis, along with feedback on the Proposed Rulemaking, for our future strategy with respect to the Sustaining Working Landscapes policy initiative.

## **Healthy Forest and Rangeland Initiative**

The Healthy Forests and Rangeland Initiative is a regulatory and legislative initiative that aims to reduce unnecessary regulatory obstacles and allow for more effective and timely forest and rangeland health actions. It will speed forest and woodland thinning, as well as rangeland treatments. The initiative will also shorten the time for appeals of forest and rangeland health decisions, expedite Endangered Species Act consultations, and streamline environmental assessments. These measures will help protect grazing lands from devastating wildfires caused by excessive fuel buildup.

The new procedures preserve the principle of partnerships with local communities and interests. Most fuels treatment projects carried out under the Healthy Forest and Rangeland Initiative will use a collaborative process that includes all stakeholders and partners at the local level.

## **National Fire Plan**

The Department of the Interior, the Forest Service and states are collaborating on the implementation of the National Fire Plan through guidance provided by the Collaborative Approach for Reducing Wildland Fire Risk for Communities and the Environment Ten Year Comprehensive Strategy (hereinafter referred to as the Ten Year Comprehensive Strategy) and the Ten Year Comprehensive Strategy Implementation Plan. The agencies have installed tracking and reporting mechanisms to provide accountability as accomplishments are made in firefighting, rehabilitation and restoration, hazardous fuels reduction, community assistance, and research. Collaboration with state and local governments is an important component of the Implementation Plan.

The National Fire Plan is a long-term investment that will help protect communities, natural resources, and the lives of firefighters and the public. It is a long-term commitment based on cooperation and communication among Federal agencies, States, local governments, tribes, and interested publics.

Like the Healthy Forest and Rangeland Initiative, an integral element of the National Fire Plan is to reduce excess forest and rangeland fuels which contribute to catastrophic fires and can harm adjoining grazing land.

## **Vegetation Treatment EIS**

The BLM is preparing a national programmatic EIS to update four existing EISs for 13 western States, and to analyze vegetative treatments in four other western States and Alaska. The Vegetation Treatment EIS would examine the effects of such treatment as prescribed fire, herbicides and biological control agents, and mechanical and manual extraction.

As part of the EIS, the BLM will also evaluate the potential risks to humans, fish, and wildlife from several new herbicides that were not evaluated in earlier EISs. The BLM will also develop protocols as part of the EIS that will allow it to evaluate risks from chemicals that may be developed in the future.

The Vegetation Treatment EIS would analyze restoration activities such as prescribed fire, understory thinning, forest health treatments, or other activities related to restoring fire-adapted ecosystems.

## **BLM Sage-Grouse Habitat Conservation Strategy**

The BLM is currently working to help reverse the precipitous population decline of the sage-grouse, a species under consideration for federal listing under the ESA, through a comprehensive habitat conservation strategy. Prior to the arrival in the West of settlers of European descent, sage-grouse were widely distributed, inhabiting sagebrush habitats across areas that are now portions of at least 13 western states and three provinces in Canada.

Sage-grouse have since been extirpated from 5 states and 1 province. In 1998, a leading sage-grouse researcher estimated that overall distribution of all sage-grouse had decreased by an estimated 50% since settlement of the West began, and that the apparent breeding population size had decreased from 45 to 80% since the early 1950's, with much of that decrease occurring since 1980. At that time, the rangewide spring population of sage-grouse was estimated at 142,000 birds. This estimate included what in 2000 was recognized as the Gunnison sage-grouse, a new species whose decline in range and numbers far exceeds that of the now greater sage-grouse. There is no single factor responsible for the declines. Rather, it is primarily a combination of the continuing, loss, degradation and fragmentation of the habitats to which they are so closely tied, exacerbated by periodic drought.

Today the BLM manages over 50% of the remaining sage-grouse habitat. The BLM Sage-Grouse Conservation Strategy will describe the actions necessary to conserve sage-grouse and their habitats on BLM land. Each BLM state within the range of the sage-grouse will develop a state level, BLM-specific strategy. Both the BLM national and state strategies will complement state wildlife agency led conservation efforts.

The Strategy will provide BLM managers in different states with consistent guidance to aid the development of their respective sage-grouse BLM state-level habitat conservation strategies by making recommendations to ensure conservation of sagebrush habitat and sagebrush dependent species. The strategy is a sage-grouse range-wide effort that involves a diverse group of cooperators including multiple Federal, State and Tribal agencies as well as special interest groups and private landowners.

Appropriate and timely conservation measures for sage-grouse are critical to preventing further population declines and ESA listing of the species. Once a species is listed, land management processes become more cumbersome and land uses become more restricted. Pro-active measures on BLM's part may be the key to preventing the ESA listing of the sage-grouse.

